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28906

No. 136

COURT OF APPEALS

STATE OF NEW YORK

In the Matter of the Application for a Review under Article 13 of the Tax Law of a Tax Assessment by

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,

Petitioner-Appellant

against

THE BOARD OF ASSESSORS OF THE TOWN OF RIVERHEAD, NEW YORK, and THE TOWN OF RIVERHEAD a party by operation of law,

Respondents

RECORD ON APPEAL

CAHILL, GORDON, REINDEL & OHL,
Attorneys for Petitioner-Appellant,
63 Wall Street,
Borough of Manhattan,
New York 5, New York
WH 4-7400

REGINALD C. SMITH,
Attorney for Respondents,
No. 137 West Main Street,
Riverhead, New York
PA 7-4100

INDEX TO APPELLATE DIVISION

	PAGE
Statement Under Rule 234	1
Notice of Appeal	2
Notice under Article 13 of Tax Law	4
Petition	5
Exhibit A, Annexed Thereto	15
Exhibit B, Annexed Thereto	40
Notice of Motion to Dismiss Under Rule 106 R. C. P.	48
Excerpts from Argument before Special Term, October 21, 1955	49
Final Order Appealed From	59
Decision—Opinion of Hogan, J.	61
Stipulation Waiving Certification	71
Order Filing Record in the Appellate Division	72

INDEX TO COURT OF APPEALS

Notice of Appeal to the Court of Appeals from Order	73
Stipulation of Substitution of Attorneys	75
Order of Reversal Appealed From	76
Opinion of Reversal	78
Stipulation Waiving Certification in the Court of Appeals	80

NEW YORK SUPREME COURT

APPELLATE DIVISION—SECOND DEPARTMENT

In the Matter of the Application for a Review under Article 13 of the Tax Law of a Tax Assessment by

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
Petitioner-Respondent,

against

THE BOARD OF ASSESSORS OF THE TOWN OF RIVERHEAD, NEW YORK,
Respondents-Appellants.

Statement Under Rule 234.

This proceeding was commenced by the service of a notice and annexed petition upon the Respondents on the 9th day of September, 1955. No answer has been served. Notice of motion to dismiss pursuant to Rule 106 of the Rules of Civil Practice was served on September 21, 1955. The names of the original parties in full are as given above. By operation of law the Town of Riverhead automatically became a party to this proceeding on or about December 1, 1955.

Common School Districts numbered 1 and 2 of the Town of Riverhead became a party *amici curiae* with the permission of the Court on the 21st day of October, 1955, and appeared herein by EDWIN S. LAPHAM, ESQ., their attorney, of 220 Roanoke Avenue, Riverhead, New York.

Common School District numbered 4 of the Town of Riverhead became a party *amicus curiae*

with the permission of the Court on the 21st day of October, 1955, and appeared herein by HORACE A. DEMAREST, JR., ESQ., its attorney, of 306 Roanoke Avenue, Riverhead, New York.

Except as hereinbefore stated, there has been no change in the parties or the attorneys.

Notice of Appeal

SUPREME COURT

SUFFOLK COUNTY

In the Matter of the Application for a Review under Article 13 of the Tax Law of a Tax Assessment by

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,
Petitioner,

against

THE BOARD OF ASSESSORS OF THE TOWN OF RIVERHEAD, NEW YORK,
Respondents.

PLEASE TAKE NOTICE that the Board of Assessors of the Town of Riverhead, New York, and the Town of Riverhead, hereby appeal to the Appellate Division of the Supreme Court for the Second Judicial Department from the final order of the Supreme Court, Suffolk County, dated the 4th day of January, 1956, and filed in the Office of the County Clerk of Suffolk County on the 9th day of January, 1956, which order denied

the Respondents' motion to dismiss the petition and which directed that the Respondents and all tax officials having jurisdiction of the subject-matter strike from the assessment roll of the Town of Riverhead for the year 1955-56 the assessments of the Petitioner, GRUMMAN AIRCRAFT ENGINEERING CORPORATION, and these Respondents do appeal from each and every part of said order as well as from the whole thereof.

Dated: January 9th, 1956.

Yours, etc., 8

REGINALD C. SMITH
Attorney for Respondents,
Office and Post Office Address,
137 West Main Street,
Riverhead, New York.

To:

CHARLES KINGSLEY, ESQ.,
Attorney for Petitioner,
South Oyster Bay Road,
Bethpage, New York.

9

EDWIN S. LAPHAM, ESQ.,
Attorney for Common School
Districts Numbers 1 and 2,
Town of Riverhead, Amici Curiae,
220 Roanoke Avenue,
Riverhead, New York.

HORACE A. DEMAREST, JR., ESQ.,
Attorney for Common School Distric'
No. 4, Town of Riverhead, Amicus Curiae,
306 Roanoke Avenue,
Riverhead, New York.

10 **Notice Under Article 13 of Tax Law**

SUPREME COURT

COUNTY OF SUFFOLK

[SAME TITLE]

PLEASE TAKE NOTICE, that upon the petition of Grumman Aircraft Engineering Corporation duly verified the 9th day of September, 1955, a copy of
11 which is hereto annexed, an application will be made at a Special Term of the Supreme Court, to be held at the Suffolk County Court House, Griffing Avenue, Riverhead, New York, on the 11th day of October, 1955, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, for the review under Article 13 of the Tax Law of the State of New York of the assessments against the petitioner appearing on the 1955-56 assessment roll, Town of Riverhead, New York, and affecting real property owned by the United States of America and leased to and occupied by petitioner, which property is situated
12 in the Town of Riverhead, New York, as more particularly described in the annexed petition, and for such other and further relief as to the Court may seem just and proper.

Dated, September 9th, 1955.

Yours, etc.,

CHARLES KINGSLEY, ESQ.
Attorney for Petitioner
Office and Post Office Address:
South Oyster Bay Road
Bethpage, New York

Petition 13

To:

THE CLERK OF THE TOWN OF
RIVERHEAD, New York

THE CLERK OR A TRUSTEE OF
SCHOOL DISTRICT #1,
Calverton, New York

THE CLERK OR A TRUSTEE OF
SCHOOL DISTRICT #2,
Calverton, New York

THE CLERK OR A TRUSTEE OF 14
SCHOOL DISTRICT #4,
Calverton, New York

Petition

SUPREME COURT

COUNTY OF SUFFOLK

[SAME TITLE] 15

TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF SUFFOLK:

The petition of Grumman Aircraft Engineering Corporation respectfully shows:

1. Your petitioner is a corporation organized and existing under the laws of the State of New York and has its principal office and place of busi-

16 *Petition*

ness at South Oyster Bay Road, Bethpage, Nassau County, New York.

2. Upon information and belief, that at the times hereinafter mentioned, the respondent, The Board of Assessors of the Town of Riverhead, New York, was charged with the duty of determining the taxable status, the valuing and assessing of real property situated in the Town of Riverhead for town, county, school and state tax purposes.

3. The United States Government is now and
17 was during all the times hereinafter mentioned the owner of certain real property situated in the Town of Riverhead, described on the assessment roll of the Town of Riverhead for the year 1955-56 as follows:

"Grumman Aircraft Engineering Corp.
Calverton, New York

1 T 15 16 20 41

N—Parker Road and Airport north line
E—Parker Road
S—School District No. 2
W—Airport west line"

18

"Grumman Aircraft Engineering Corp.
Calverton, New York

2 T 15 16 23 45

N—Scl. Dist. 1, Mdl. Cy. Rd. & Scl. Dist. 4
E—Airpt east line and Scl. Dist. 4 and, in part, by Line Rd.
S—Peconic River, Airpt so. line, Swan Pond Rd & Wading River Rd.
W—Wading River Rd. & Airpt west line."

"GRUMMAN AIRCRAFT ENGINEERING CORP.
CALVERTON, NEW YORK

4 T 15 16 20 50

N—Mdl. Cy. Rd. & Airpt north line
E—Airport east line
S—Peconic River
W—School District No. 2"

4. That title to said real property was acquired by the United States of America through eminent domain proceedings instituted in the United States 20
District Court for the Eastern District of New York entitled, "United States of America, Petitioner-Plaintiff, versus 4,475.23 acres of land etc., Defendants (Civil Action No. C. P. 84)" and said title has been held by the United States of America since the filing of a Declaration of Taking in said proceeding on or about May 8, 1952.

5. Petitioner is now and was during all the times hereinafter mentioned the lessee and occupant of the above described real property owned by the United States Government by virtue and under the authority of a lease agreement with the 21
United States Government dated April 1, 1954 and designated Contract NOa 5682, a copy of which, marked "Exhibit A" is attached hereto and made a part hereof.

6. That prior to June 1st, 1955, said Board of Assessors prepared and completed an assessment roll for the Town of Riverhead and caused to be published due notice of completion thereof and that the same might be seen and examined at the office of said Board during the month of June 1955.

7. That an alleged taxable interest in the said real property leased and occupied by the petitioner was tentatively assessed against your petitioner on said assessment roll for the year 1955-56 for said Town of Riverhead, as follows:

"GRUMMAN AIRCRAFT ENGINEERING CORP.
CALVERTON, NEW YORK

1 T 15 16 20 41

N—Parker Road and Airport north line.
23 E—Parker Road
S—School District No. 2
W—Airport west line

100/4475 interest under contract with U. S. of 4/1/54

The interest of the United States or of this State in the foregoing property is not assessed or taxed.

Total $17,000

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24 "ASSESSMENT OF PROPERTY OMITTED FROM THE 1954 ASSESSMENT ROLL AND ASSESSED THIS YEAR PURSUANT TO THE PROVISIONS OF SECTION 24 OF THE TAX LAW

GRUMMAN AIRCRAFT ENGINEERING CORP.
CALVERTON, NEW YORK

1 T 15 16 20 41

N—Parker Road and Airport North line
E—Parker Road
S—School District No. 2
W—Airport west line

100/4475 interest under contract with U. S. of 4/1/54

The interest of the United States or of this State in the foregoing property is not assessed or taxed.

Total $11,400

GRUMMAN AIRCRAFT ENGINEERING CORP.
CALVERTON, NEW YORK

2 T 15 16 23 45 26

N—School Dist. 1, Mdl Cy. Rd. & Scl. Dist. 4
E—Airpt east line and Scl. Dist. 4 and, in part by Line Rd.
S—Peconic River Airpt. so. line, Swan Pond Rd. & Wading River Rd.
W—Wading River Rd & Airpt west line

3635/4475 interest under contract with U. S. of 4/1/54

The interest of the United States or of this State in the foregoing property is not assessed or taxed. 27

Total $631,300

28 *Petition*

"Assessment of Property Omitted from the 1954 Assessment Roll and Assessed this Year Pursuant to the Provisions of Section 24 of the Tax Law.

Grumman Aircraft Engineering Corp.
Calverton, New York

2 T 15 16 23 45

N—Scl. Dist. 1, Mdl. Cy. Rd. & Scl. Dist. 4
E—Airpt east line and Scl. Dist. 4 and, in
29 part, by Line Rd.
S—Peconic River, Airpt so. line, Swan Pond Rd. & Wading River Rd.
W—Wading River Rd. & Airpt west line.

3635 4475 interest under contract with U. S. of 4/1/54

The interest of the United States, or of this State in the foregoing property is not assessed or taxed.

Total $421,400

30 Grumman Aircraft Engineering Corp.
Calverton, New York

4 T 15 16 20 50

N—Mdl. Cy. Rd. & Airpt north line
E—Airport east line
S—Peconic River
W—School District No. 2

540 4475 interest under contract of 4/1/54 with U. S.

The interest of the United States or of this State in the foregoing property is not assessed or taxed.

Total **$94,800**

ASSESSMENT OF PROPERTY OMITTED FROM THE 1954 ASSESSMENT ROLL AND ASSESSED THIS YEAR PURSUANT TO THE PROVISIONS OF SECTION 24 OF THE TAX LAW

GRUMMAN AIRCRAFT ENGINEERING CORP.
CALVERTON, NEW YORK

4 T 15 16 20 50

N—Mdl. Cy. Rd. & Airpt north line
E—Airport east line
S—Peconic River
W—School District No. 2

540 4475 interest under contract of 4/1/54 with U. S.

The interest of the United States or of this State in the foregoing property is not assessed or taxed.

Total ..... $63,200"

8. That said assessments were made by the Board of Assessors on the erroneous assumption that petitioner has an interest in said real property assessable and taxable under Article I, Section 4, Subdivision 17 of the Tax Law of the State of New York which provides in part as follows:

"Whenever the legal title of real property is in the United States or in this State, but the use, occupation or possession thereof is in a corporation, association, co-partnership or individual, or its or his successor in interest, under a contract of sale or other agreement whereby upon certain payment or payments the legal title is to be or may be acquired by such corporation, association, co-partner-

ship or individual, his or its interest in such real property shall be assessed and taxed as real property subject to the provisions of this subdivision."

9. That the aforesaid lease between petitioner and the United States of America is the only agreement or contract between the Government of the United States and petitioner relating to the aforesaid property and said lease is not a contract of sale or other agreement within the
35 provisions of Article I, Section 4, Subdivision 17 of the Tax Law, and your petitioner does not have the use, occupation or possession of said real property under a contract of sale or other agreement whereby upon certain payment or payments the legal title is to be or may be acquired by petitioner.

10. That your petitioner, deeming itself aggrieved by said assessments duly made application in writing to said Board of Assessors on or before the third Tuesday in July, 1955, protesting said assessments on the grounds that the
36 same were illegal, erroneous and void because the petitioner does not have an interest in the said real property subject to assessment and tax within the provisions of the Tax Law of the State of New York and on the ground that said assessments were an indirect attempt to tax real property owned by the United States of America which is specifically exempt from tax under the provisions of the Tax Law of the State of New York, Article I, Section 4, and the Constitution of the United States. Your petitioner demanded that said assessments be struck from the rolls and the premises be listed as exempt. A copy of said ap-

plication is hereto annexed, marked Exhibit B and made a part hereof.

11. That the said Board of Assessors received said application but has neglected and refused to strike said assessments from the rolls and list said property as exempt.

12. That on or before the 1st day of September 1955 the Board of Assessors finally completed, signed and verified said assessment roll, as your petitioner is informed and believes, leaving thereupon the assessments against your petitioner, as 38
shown in paragraph 7 herein, totaling the sum of $1,239,100.00, and filed said roll in the office of the Town Clerk of the Town of Riverhead and posted notice as provided by law.

13. That thirty days have not elapsed since such completion, verification and filing thereof.

14. That the assessments against this petitioner described in paragraph 6 herein are illegal, erroneous and void and therefor excessive on ground that this petitioner does not have any interest in said real property subject to assess- 39
ment and tax within the provisions of the Tax Law of the State of New York, Article I, Section 4, Subdivision 17, or any other provision of the Tax Law; on the ground that the assessments are against real property owned by the United States of America which is specifically exempt from tax under the provisions of the Tax Law of the State of New York, Article I, Section 4, and the Constitution of the United States; on the ground that they are illegal and void, being an indirect assessment and tax on real property of the United States of America, which is specifically exempt from tax by law as aforesaid.

40 *Petition*

15. That no previous application for the relief demanded herein has been made to any Court or Judge.

WHEREFORE, your petitioner prays that all and singular the proceedings, decisions and actions of said Board of Assessors had and made in the premises be reviewed and corrected; that said assessments be declared illegal, erroneous and void and that said Assessors be ordered and directed to strike said assessments against your petitioner from the rolls and that the said
41 premises be shown on said rolls as exempt property; and that your petitioner have such other and further relief as to this Court may seem just, together with the costs and disbursements of this proceeding.

Dated, September 9th, 1955.

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,

Petitioner,

By /s/ E. CLINTON TOWL
Administrative Vice President

42

CHARLES KINGSLEY, ESQ.
Attorney for Petitioner
South Oyster Bay Road
Bethpage, New York

(Verified Sept. 9, 1955.)

Exhibit A, Annexed to Petition

Aer-CO-JHM:rw 26 August 1954

Contract NOa 5682

Supplemental Facilities Agreement

THIS NEGOTIATED AGREEMENT, made as of the first day of April, 1954, between the UNITED STATES OF AMERICA (hereinafter called the "Government"), represented by the Contracting Officer executing this contract, and GRUMMAN AIRCRAFT ENGINEERING CORPORATION, a corporation organized and existing under the laws of the State of New York, whose address is Bethpage, Long Island, New York (hereinafter called the "Lessee"),

WITNESSETH:

WHEREAS, the Government and the Lessee have heretofore executed a Facilities Contract NOa-1151, dated 23 January 1952; and

WHEREAS, such Facilities Contract provided for the acquisition of certain machine tools and equipment and the construction of an Assembly Plant, together with supporting facilities; and

WHEREAS, the Secretary of the Navy (hereinafter called the "Secretary") has determined that the Plant and supporting facilities (hereinafter described and referred to as the "Facilities") are not excess to the needs of the Department of the Navy (hereinafter called the "Department") but are not, for the time being, required for public use; and

WHEREAS, the Facilities are required by the Lessee for use in performing contracts for the Government; and

46 *Exhibit A, Annexed to Petition*

WHEREAS, the Secretary has determined that it will promote the national defense and will be in the public interest to lease the Facilities to the Lessee upon the terms and conditions hereinafter set forth; and

WHEREAS, this Agreement is made under the authority of and in accordance with the provisions of the Act approved August 5, 1947 (34 U. S. C. 522a); the Act approved July 17, 1953 (50 U. S. C. App. 1173-5); and Title II of the First War Powers Act, 1941, (50 U. S. C. App. 611), as amended
47 and extended; and

WHEREAS, this Agreement has been approved by the Armed Services Committees of the Congress in accordance with the Act approved September 28, 1951 (40 U. S. C. 551 et seq.).

NOW, THEREFORE, in consideration of the premises and of the terms, covenants and conditions hereinafter set forth, the parties hereto do hereby agree as follows:

ARTICLE I—LEASED PROPERTY

48

(a) The Government does hereby lease, rent and demise to the Lessee and the Lessee does hereby hire and rent from the Government the following described property (hereinafter called the "Facilities");

> The Naval Industrial Reserve Aircraft Plant, D. O. D. No. 466 situated in the Towns of Riverhead and Brookhaven, near Calverton in Suffolk County, Long Island, New York, including all land owned or controlled by the Government and all runways, taxiways,

aprons, plants, buildings, building installations, structures, utilities, improvements and appurtenances located upon said land or forming a part of the land, installations or rights, including easements affecting or necessary for the use of said land or portions thereof, condemned, purchased, acquired or constructed for use in connection with and as a part of said Naval Industrial Reserve Aircraft Plant; all as more specifically shown and delineated by the property line shown on Plot Plan PR 4, dated April 1, 1954, attached hereto as Exhibit "A", which by this reference is incorporated herein and made a part hereof. 50

(b) In order to protect the aerial approaches to the demised premises, the Government may acquire easements, fees or other interests in land adjacent to or in the vicinity of the demised premises as may be appropriate to accomplish such purposes. It is contemplated by the parties hereto that, in the event the Government does acquire any such land or any such interests therein, this agreement will be amended to include such additional property, or interests therein, as part of the demised premises without additional consideration to the Government. 51

ARTICLE II—TERM

The term of this lease shall be for a period of five years, commencing on the first day of April 1954, and ending on the 31st day of March 1959, unless sooner terminated as herein provided. Upon the expiration of said term by lapse of time, Lessee shall have the option to renew or extend this lease upon the same terms and conditions as

herein set forth, for two successive periods of five (5) years each, subject, however, to the following:

(a) Lessee shall exercise its option by giving the Government notice of its intention to renew or extend said lease which said notice shall be given not more than one year and not less than six months prior to the expiration of the original term hereof and prior to the expiration of the first five-year renewal hereof.

(b) The rental to be paid by Lessee for any renewed or extended term shall, at the option of the Government, be subject to renegotiation prior to the commencement of any such renewed or extended term.

ARTICLE III—USE

The Lessee shall have the right to use the Facilities for the following purposes:

For all general industrial purposes, including but not limited to, the production, assembly, overhaul, maintenance, servicing or flight testing of all types of aircraft and missiles, including engines, components, accessories and parts therefor; for commercial air operation; and for such other purposes as the Contracting Officer may, from time to time, approve in writing: *provided, however*, that Lessee shall at all times devote so much of said Facilities to the performance of contracts for the Department as the Contracting Officer shall from time to time deem reasonable and necessary for the performance of such contracts; and *provided, further*, that at no time shall Lessee use said Facilities for such purposes or in such a manner as to impair materially the mobilization production capacity of said Facilities.

ARTICLE IV—RENT

(a) Subject to the provisions of paragraph (b) of Article II hereof and of paragraph (d) of this Article IV, the Lessee shall pay, as annual rental for the Facilities the sum of $2,800,000 or the total of the following, whichever is the lesser:

(i) $250,000 (hereinafter called "minimum rental") plus

(ii) The sum obtained by multiplying by twenty-two cents (22¢) the total manhours, as hereinafter defined, in excess of 2,045,500 worked during each lease year (hereinafter called "additional rental"). 56

(b) The rental reserved herein shall be paid in the following manner:

(i) The minimum rental shall be paid in quarterly installments, in advance, commencing on the first day of April, 1954.

(ii) The additional rental, if any, shall be paid quarterly on or before the thirtieth day of the month following the end of each quarter and shall be computed on all manhours worked during said preceding quarter in excess of 511,375; *provided, however*, that at the end of each lease year, or at the time this lease is terminated in accordance with Article VII or VIII hereof, Lessee shall be entitled to a credit on the minimum rental for the following lease year (or in the event of termination a credit on the minimum rental for the current year) in an amount equal to any additional rental paid which is in excess of the sum specified in paragraph (a) hereof. 57

58 *Exhibit A. Annexed to Petition*

(c) The term "manhours", as used herein, shall mean the total manhours worked by all those employees (i) regularly assigned to the Facilities by the Lessee and (ii) regularly assigned to the Facilities by sublessees hereunder, if any.

(d) Not less than thirty days prior to the expiration of (i) the second year of the initial term hereof and (ii) the second year of any renewed or extended term hereof, the parties hereto agree to meet for the purpose of determining whether
59 the introduction of an automaton or other advanced machining processes or the presence of any other factors has vitiated the validity of the basis used for determining additional rental as set forth in subparagraph (ii) of paragraph (a) hereof. In the event that the parties hereto agree that said basis for determining additional rental has been so vitiated, this lease shall be amended to establish a new basis for determining additional rental for the last three years of such initial or renewed or extended term: *provided, however*, that in the event the parties hereto are unable to agree within 60 days of the commencement of the third
60 year of the initial or renewed or extended term, on whether said basis for determining additional rental has been vitiated or on a new basis for determination of additional rental, then such disagreement shall be considered a dispute concerning a question of fact arising under this lease and shall be settled in accordance with paragraph (f) of Article XVI hereof.

ARTICLE V—MAINTENANCE

The Lessee shall protect, preserve, maintain and repair the Facilities in accordance with sound industrial practice and as the Department may from

time to time require and direct. Upon the expiration or earlier termination of this lease, the Lessee agrees to surrender the Facilities peaceably to the Government in as good condition as when received; reasonable wear and tear excepted.

ARTICLE VI—INSURANCE

(a) All risk of loss of or damage to the Facilities during the term of this lease, whether or not caused by the failure of the Lessee to exercise due diligence in complying with the provisions 62
hereof, shall be borne by the Lessee and the Lessee shall upon demand and, at the election of the Department, either compensate the Government in full for any such loss or damage or rebuild, replace or repair any item of the Facilities so lost or damaged: *Provided, however*, that the Lessee shall be liable for loss of or damage to the Facilities resulting from risks expressly required to be insured hereunder only to the extent of insurance so required to be procured and maintained or to the extent of insurance actually procured and maintained, whichever shall be the greater, and *Provided further*, that the Lessee shall not be 63
liable for loss of or damage to the Facilities arising from causes beyond the control of the Lessee and not customarily covered by insurance in the locality in which the Facilities are situated.

(b) The Lessee shall procure and maintain at its expense, which expense Lessee covenants and agrees will not be charged either directly or indirectly into the cost or price of any work performed, either directly or indirectly, for the Government, the following property damage insurance, in amounts and types which may exceed but

shall not be less than the minimum amounts and types hereinafter specified:

Type	*Amount*
(i) Fire and Extended Coverage, including strikes, riots, civil commotion, vandalism and malicious mischief	$13,000,000.00
(ii) Boiler and Explosion Coverage	$ 500,000.00

65 The obligation to insure the Facilities under this paragraph shall not commence until acceptance of the Facilities under Contract NOa-1151 or until such time as the subcontractors under Contract NOa-1151 are no longer responsible for loss of or damage to the Facilities, whichever first occurs.

(c) The Lessee shall procure and maintain, with respect to its use or maintenance of the Facilities, workmen's compensation, employer's liability and bodily injury insurance and third party property damage insurance in such amounts as shall be reasonable to cover the risks both of the Government and of the Lessee or in such amounts as the 66 Department may otherwise direct under paragraph (d) hereof.

(d) Except as otherwise specifically provided herein, all insurance required by this lease to be carried by the Lessee on the Facilities shall be in such form, for such amounts, for such periods of time, and with such insurers as the Department may from time to time reasonably require or approve, which approval may permit the Lessee to be a self-insurer in appropriate circumstances, and shall contain provision for thirty (30) days' prior notice to the Office of Naval Material. In

surance Branch, Washington 25, D. C., in the event of cancellation of the policy on the part of the insurer. A certificate of insurance or a certified copy of each policy of insurance taken out hereunder shall be deposited promptly with said Insurance Branch. The Lessee agrees that, not less than thirty (30) days prior to the expiration of any insurance required by this contract to be carried by the Lessee on the Facilities, it will deliver to said Insurance Branch a certificate of insurance or a certified copy of each renewal policy to cover the same risks. All insurance 68
required or carried by the Lessee on any of the Facilities shall be for the protection of the Government and the Lessee against their respective risks and liabilities in connection with the Facilities. Each such policy of insurance shall name the Lessee and the United States of America (Department of the Navy) as the insured and shall contain a loss payable clause reading substantially as follows: "Loss, if any, under this policy shall be adjusted with Grumman Aircraft Engineering Corporation and the proceeds, at the direction of the Government, shall be payable 69
to Grumman Aircraft Engineering Corporation; and proceeds not paid to Grumman Aircraft Engineering Corporation shall be payable to the Treasurer of the United States of America." Each policy of insurance covering workmen's compensation, employer's liability and bodily injury and third party property damage shall contain an endorsement reading substantially as follows: "The insurer waives any right of subrogation against the United States of America which might arise by reason of any payment under this policy."

(e) In the event that any item or part of the Facilities shall require repair, rebuilding or replacement resulting from loss or damage the risk of which is required to be covered by insurance hereunder, the Lessee shall promptly give notice thereof to the Department. If the proceeds of any insurance covering such loss or damage are sufficient to permit the completion of such repair, rebuilding or replacement, the Lessee shall effect such repair, rebuilding or replacement. If the proceeds of any insurance covering such loss or
71 damage are not sufficient to permit the completion of such repair, rebuilding or replacement, the Lessee shall effect such repair, rebuilding or replacement if required so to do by the Department and the excess of the cost of such repair, rebuilding or replacement over such insurance proceeds as are available shall be reimbursed to the Lessee. In the event that the Lessee shall have effected any repair, rebuilding or replacement which the Lessee is required to effect pursuant to this paragraph, the Contracting Officer shall direct the payment to the Lessee of so much of the proceeds of any insurance carried by the Lessee and made
72 available to the Government on account of loss of or damage to any item or part of the Facilities as may be necessary to enable the Lessee to effect such repair, rebuilding or replacement. In the event that the Lessee shall not have been required to effect such repair, rebuilding or replacement, and if the insurance proceeds allocable to the loss or damage which has created the needs for such repair, rebuilding or replacement have been paid to the Lessee, the Lessee shall promptly refund to the Government the amount of such proceeds.

Exhibit A. Annexed to Petition 73

ARTICLE VII—TERMINATION

This lease may be terminated by the Department at any time prior to the expiration of the term hereof:

(a) During any national emergency declared by the President or Congress;

(b) Upon ninety (90) days written notice to the Lessee whenever the Secretary shall determine that the interests of the national defense so require;

74

(c) Upon ten (10) days written notice to the Lessee if the Lessee shall have defaulted in the performance of any of its obligations hereunder and shall not have cured such default within sixty (60) days after receipt of a notice from the Department specifying such default, or in the event of the filing of a petition by or against the Lessee for adjudication as a bankrupt, for reorganization or for arrangement within the meaning of the Bankruptcy Act as now or hereafter amended, or in the event of the appointment of a receiver or trustee of the property of the Lessee. In the event of termination under this paragraph (c), the Department shall have the immediate right to re-enter and resume possession of the Facilities and to remove all persons and property therefrom and such re-entry shall not be deemed an acceptance of a surrender of this lease. In the event of such termination, the Department may at its election re-let the whole or any portion of the Facilities for any period, equal to, greater than, or less than the remainder of the term of this lease, to any person, for any sum and upon any terms deemed by the Department to be reasonable and satisfactory.

75

76 In the event of termination under this paragraph (c) and whether or not the Facilities shall have been re-let, the Department shall be entitled to recover and the Lessee shall pay to the Government (i) the cost to it of resuming possession of the Facilities, (ii) the cost to it of restoring, renovating, replacing or repairing all or any part of the Facilities to their condition at the inception of this lease, reasonable wear and tear excepted, (iii) the cost to it of performing any other covenant on the part of the Lessee to be performed
77 hereunder, and (iv) an amount equal to the aggregate of all rent reserved hereunder and not theretofore paid, less the net rent, if any, collected by the Government on re-letting the demised premises, which amounts shall be due and payable by the Lessee at the times on which the rent reserved under this lease would have become due and payable; that is to say, the Lessee shall pay to the Government quarterly during the remaining period of the original term of this lease the deficiency then existing. At its election and in lieu of terminating this lease pursuant to this paragraph (c), the Department may perform or cause
78 said defaulted obligations to be performed for the account and at the expense of the Lessee, in which event the Lessee shall pay to the Government the cost to the Government of performing or causing said obligations to be performed.

(d) Upon ninety (90) days written notice to the Lessee that the Secretary has determined that the Facilities, or the major portion thereof, are excess to the further needs and responsibilities of the Department; *provided, however*, that if, within such ninety (90) day period, the Lessee shall notify the Department of its intention to exercise

the right to purchase the Facilities as provided in Article X hereof, termination of this lease pursuant to this paragraph (d) shall not become effective unless and until the Department shall have obtained all necessary authorizations and approvals required to effectuate such sale to the Lessee and shall have notified Lessee that it has obtained such necessary authorizations and approvals.

ARTICLE VIII—TERMINATION BY LESSEE

80 (a) This lease may be terminated by the Lessee at any time prior to the expiration of the term granted hereunder or prior to the expiration of any extension thereof upon thirty (30) days written notice to the Department in the event of damage to or destruction of all or a substantial part of the Facilities so as to render all the Facilities incapable of use for the purposes for which they are leased hereunder, *Provided* (i) such damage or destruction is occasioned by a risk not in fact covered and not customarily covered by insurance in the locality in which the Facilities are located or by a risk which is covered by insurance and the 81 Department either has not authorized or directed the repair, rebuilding or replacement of the Facilities or does not make provision for payment for such repair, rebuilding or replacement by the application of insurance proceeds or otherwise, and (ii) such damage or destruction is not occasioned by the fault or negligence of the Lessee or by any failure or refusal on its part fully to comply with its obligations hereunder.

(b) This lease may also be terminated by the Lessee at any time prior to the expiration of the term granted hereunder or prior to the expiration

of any extension thereof upon one hundred eighty (180) days written notice to the Department and certification by the Lessee that the total manhours (as defined in Article IV hereof) worked at the Facilities in the last preceding quarter or expected to be worked at the Facilities during the current quarter, did not or will not exceed 300,000 hours. In the event of such termination, Lessee agrees to perform all obligations incurred by it prior to the effective date of termination, and the Department shall have the right to re-enter and resume
83 possession of the Facilities on the effective date of termination.

ARTICLE IX—TAXATION

In the event that as a result of any future Act of Congress subjecting Government owned property to taxation, taxes, assessments, or similar charges are imposed by state or local authorities upon the property leased hereunder, (other than upon the Lessee's possessory interest therein), the Lessee shall; (a) notify the Government of the imposition of such taxes, assessments or similar charges im-
84 mediately, and (b) pay the same when due and payable unless otherwise directed in writing by the Contracting Officer. Upon the payment of any such taxes, assessments or similar charges, this lease shall be renegotiated so as to accomplish an equitable reduction in the rental herein provided, which reduction shall not be greater than the amount of such taxes, assessments or similar charges: Provided, that, in the event the parties hereto are unable to agree within 90 days from the date of the payment of such taxes, assessments or similar charges, on the amount of such reduction, then such disagreement shall be considered to be

a dispute concerning a question of fact arising under this lease and shall be settled in accordance with paragraph (f) of Article XVI hereof.

ARTICLE X—IMPROVEMENTS, MOBILIZATION AND OPTION TO PURCHASE

(a) In the event that the Facilities are determined to be excess to the further needs and responsibilities of the Department, and the Department elects to terminate this lease in accordance with the provision of paragraph (d) of Article VII hereof, the Lessee shall have an option, 86
which may be exercised by notice of intention to purchase delivered to the Department at any time during a period of ninety (90) days after receipt of notice of termination, to purchase the Facilities at their original cost to the Government less depreciation on improvements (exclusive of improvements financed by Lessee) at the rate of 3% per annum from the date of completion of the Facilities to the date notice of Lessee's intention to exercise such option is received by the Government. Sale of the facilities to the Lessee shall, however, be subject to the Department obtaining 87
all necessary authorizations and approvals required to enable it to sell the Facilities to the Lessee.

(b) In the event Lessee purchases the Facilities in accordance with paragraph (a) hereof, the Lessee hereby covenants and agrees that, for a period of twenty (20) years from the date of the deed which effects a transfer of said Facilities to the Lessee, it will maintain said Facilities in such condition that they will at all times be capable of producing military aircraft for the Department within thirty (30) days after receipt by Lessee of

a mobilization notice from the Department; and Lessee further agrees that such covenant may, at the option of the Department, be made a part of the deed of conveyance from the Government.

(c) The Lessee hereby covenants and agrees that, subject to and in accordance with the provisions of Article XI hereof, it will, within five (5) years from the date hereof, expend not less than $1,000,000 for the construction of additional buildings, structures or other improvements to the Facilities. In the event that this lease is terminated by either party prior to the expiration of
89 the first five year term hereof, then the provisions of this paragraph (c) shall be of no force and effect; *provided, however*, that if this lease is terminated during the first term hereof and the Facilities are sold to the Lessee in accordance with the provisions of paragraph (a) of this Article and Lessee at the date of the sale has not expended $1,000,000 for the construction of additional buildings, structures or other improvements to the Facilities, then the deed of conveyance to Grumman Aircraft Engineering Corporation
90 shall contain a covenant on the part of Grumman Aircraft Engineering Corporation to carry out the provisions of this paragraph (c).

ARTICLE XI—ALTERATIONS AND REMOVAL

No major alterations, additions or betterments shall be made to any property included among the Facilities without the prior written consent of the Bureau of Aeronautics, provided, however, the Lessee may make such minor additions or alterations as may be necessary to use the Facilities in accordance with the provisions of this Agreement. All alterations, additions and betterments which

may have been made by the Lessee shall become the property of the Government when annexed to any property included among the Facilities, except those items of personal property belonging to the Lessee which can be readily removed without injury to the Facilities. Such items shall be removed by the Lessee prior to the expiration or termination of this lease, except that in the event of termination by the Department for any cause upon less than ninety (90) days advance notice to the Lessee, the Lessee may remove such items for a period of sixty (60) days after the effective 92
termination of this lease. All property not so removed shall be deemed abandoned by the Lessee and may be used or disposed of by the Government in any manner whatsoever without liability or any obligation to account to the Lessee therefor. The Lessee shall not do or suffer anything to be done upon or in connection with the Facilities which may subject them or any part of them to any liens or rights *in rem* and shall promptly discharge or cause to be discharged any lien or right *in rem* of any kind other than one in favor of the Government which at any time shall arise or exist with respect to the Facilities or to any alterations, 93
additions or betterments thereto.

ARTICLE XII—REPRESENTATIONS

The Lessee has examined and knows the condition and state of repair of the Facilities as of the date first above written, accepts them as such and hereby acknowledges that the Government has made no agreement or promise to alter, improve, adapt or repair any of the Facilities or any part thereof during the term hereof. The Lessee acknowledges further that no representations con-

cerning the condition or state of repair of any item of the Facilities, or part thereof, have been made by the Government prior to or at the time of the execution of this lease which are not set forth herein and further that this lease contains all the agreements made between the parties hereto.

ARTICLE XIII—INDEMNIFICATION

The Lessee shall indemnify and save and hold harmless the Government, its officers, agents and
95 employees of and from any and all liability incurred as the result of any breach by the Lessee, its agents, servants, employees, invitees or licensees of any covenant or condition of this lease, or as the result of the Lessee's occupancy or use of the Facilities and whether or not occasioned by the negligence or lack of diligence of the Lessee, its agents, officers, servants or employees.

ARTICLE XIV—PRORATION

The rent reserved herein shall be prorated in the event of the commencement, expiration or
96 termination (other than for default) of this lease at any time other than the beginning of a calendar quarter.

ARTICLE XV—TRANSFER OF CONTRACT AND RIGHT TO SUBLEASE

This lease shall not be transferred or assigned by the Lessee, either voluntarily or by operation of law, except with the written consent of the Department. The Lessee may, however, from time to time sublease any part or portion of the Facilities which the Lessee does not for the time being require, provided the Lessee advises the Bureau

of Aeronautics in writing of all such proposed subleases at least thirty (30) days prior to execution thereof. The Lessee hereby agrees not to enter into any sublease to which the Bureau of Aeronautics does object during such thirty (30) days period. The Lessee further agrees that it will not sublet all or any portion of the demised premises for direct or indirect use by any other Federal Agency without prior written approval of the Bureau of Aeronautics.

ARTICLE XVI—GENERAL PROVISIONS 98

(a) *Recordation and Filing.* The Lessee shall take all necessary steps to put on public record evidence of such interest in the realty and personalty involved in this lease and any amendments thereof as the Government may have thereunder. The Lessee shall, for purposes of recordation and filing, duly execute and acknowledge counterparts of this lease, or summaries thereof, in such form and manner as may be necessary to insure compliance with the provisions of this paragraph (a). Recordation and filing shall be effected by the Lessee at its own expense promptly after the execution of this lease and notice thereof, including therein the place and date of filing, shall be given by the Lessee to the Contracting Officer within a reasonable time thereafter. 99

(b) *Failure of Government to Insist on Compliance.* The failure of the Government to insist, in any one or more instances, upon performance of any of the terms, covenants or conditions of this lease shall not be construed as a waiver or relinquishment of the Government's right to the future performance of any such terms, covenants or conditions and the Lessee's obligations in respect of

such future performance shall continue in full force and effect, and the receipt and acceptance of rent shall not be deemed to be a waiver of any breach or default by Lessee of any provision of this lease nor shall it invalidate or impair the efficacy of any termination or notice of termination hereunder unless expressly so agreed in writing by the Department.

(c) *Records.*

(i) The Lessee shall keep adequate records and books of account showing the actual cost of all items of labor, material, equipment, supplies, services and other direct expenditures made in performance of Lessee's obligations under Article X hereof and, in addition thereto, shall keep full, complete and accurate records of all manhours, as defined in Article IV hereof, worked by all employees of Lessee and its sub-lessees, if any. The method of accounting and record-keeping employed by the Lessee shall be subject to the approval of the Department, but no material change will be made therein if the same conforms to good accounting practices and is sufficient for the purposes of this lease.

(ii) The Department shall, at all reasonable times, be afforded proper facilities for inspecting the records and books of account pertaining to this lease and shall, at all reasonable times, have access thereto for such purposes. All information obtained from said records and books of account shall be deemed confidential.

(d) *Covenant against Contingent Fees.* The Lessee warrants that it has not employed any person to solicit or secure this lease upon any agreements for a commission, percentage, brokerage

or contingent fee. Breach of this warranty shall give the Government the right to annul this lease, or, in its discretion, to recover from the Lessee the amount of such commission, percentage, brokerage or contingent fee in addition to the consideration herein set forth. This warranty shall not apply to commissions payable by the Lessee upon contracts or sales secured or made through *bona fide* established commercial or selling agencies maintained by the Lessee for the purpose of securing business.

104

(c) *Officials Not to Benefit.* No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this lease or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this lease if made with a corporation for its general benefit.

(f) *Disputes.* Except as otherwise provided herein, all disputes concerning a question of fact arising under this lease shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Lessee. Within thirty (30) days 105 from the date of receipt of such copy, the Lessee may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, be final and conclusive; provided that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In

106 *Exhibit A, Annexed to Petition*

connection with any appeal proceeding under this clause, the Lessee shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Lessee shall proceed in accordance with the decision of the Contracting Officer.

(g) *Definition of "Department"*. "Department", as used in this lease shall mean the Secretary of the Navy, the Chief of the Bureau of Aeronautics, the Contracting Officer, and such other duly authorized representative or representatives
107 as the Secretary or the Chief of the Bureau of Aeronautics may designate from time to time.

(h) *Labor Provisions.*

(i) The Lessee shall not employ, in the performance of any work required to be performed under this lease, any person undergoing sentence of imprisonment at hard labor.

(ii) No laborer or mechanic doing any part of the work required to be performed under this lease, in the employ of the Lessee or any subcontractor contracting for any part of said work,
108 shall be required or permitted to work more than eight hours in any one calendar day upon such work at the site thereof, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this subparagraph (ii). The wages of every laborer and mechanic employed by the Lessee or any subcontractor engaged in the performance of work required under this lease shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for

all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this subparagraph (ii) a penalty of Five Dollars ($5.00) shall be imposed upon the Lessee for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this subparagraph (ii), and all penalties thus imposed shall be withheld for the use and benefit of the Government: Provided, 110 that this stipulation shall be subject in all respects to the exceptions and provisions of the Act of June 19, 1912 (U. S. Code, Title 40, Sections 324 and 325) relating to hours of labor, as modified by the provisions of Section 303 of Public Law No. 781, 76th Congress, approved September 9, 1940, relating to compensation for overtime; and

(iii) The Lessee, in performing the work required to be performed under this lease, shall not discriminate against any employee or applicant for employment because of race, creed, color or 111 national origin. All subcontracts made under this lease shall contain similar provisions. For the purpose of this Article, subcontracts shall be deemed to include all purchase orders and agreements to perform all or any part of the work, or to make or furnish any article required for the performance of work to be performed under this lease, except purchase orders or agreements for the furnishing of standard commercial articles or raw materials.

(i) *Notices.* No notice, order, direction, determination, requirement, consent or approval

under this lease shall be of any effect unless in writing.

(j) *Exhibits.* The Exhibits and Schedules attached hereto and all matters contained therein are hereby made a part of, and incorporated in, this lease.

ARTICLE XVII—SURVIVAL

This lease shall be binding upon the Lessee, its successors and assigns.

113

ARTICLE XVIII—AGREEMENT OF USE SUPERSEDED

The provisions of Part II of Contract NOa-1151, dated 23 January 1952, between the Bureau of Aeronautics and Grumman Aircraft Engineering Corporation, insofar as they relate to the use of the Facilities by Grumman Aircraft Engineering Corporation, are, as of the date hereof, superseded by this Agreement.

IN WITNESS WHEREOF, the parties hereto have duly executed this lease as of the day and year first above written.

114

UNITED STATES OF AMERICA

By /S/ D. M. WISEHAUPT
Contracting Officer
Bureau of Aeronautics
Department of the Navy

GRUMMAN AIRCRAFT ENGINEERING CORPORATION (Lessee)

/S/ L. A. SWIRBUL
Title: PRESIDENT

Exhibit A, Annexed to Petition 115

Contract NOa 5682

INSTRUCTIONS TO INSPECTORS

The Bureau of Aeronautics Representative, Bethpage, L. I., New York, has been assigned as the Naval Inspector having cognizance of this contract for technical inspection. Such inspector will conduct physical inspection at the place of manufacture, perform tests, and accept or reject the supplies or services being procured in accordance with the terms of the contract. Such inspector will also perform contract and security administration (when necessary) in connection with the contract and will certify invoices and vouchers as required by the terms of the contract. 116

NAVAER 2891A (New 8-52)

117

118

Exhibit B, Annexed to Petition

To the Board of Assessors of the Town of Riverhead, Suffolk County, New York:

Please Take Notice that Grumman Aircraft Engineering Corporation, having its principal office at South Oyster Bay Road, Bethpage, New York, hereinafter designated as the petitioner, occupying real property within the tax district comprising the Town of Riverhead, as a lessee of the United States of America, under the terms of a lease dated April 1st, 1954, designated as Con-
119 tract No. NOa-5682, a copy of which has been furnished to the Board of Assessors, objects to and protests the assessment of an asserted contract interest in said real property under the aforesaid contract, as set down in the assessment roll of the Town of Riverhead for the year 1955-56 and the assessment included in said roll of property said to have been omitted in the assessment roll for the year 1954-55.

The aforesaid assessments of petitioner's asserted contract interest affect three parcels of realty described in said assessment roll as follows:

120

"Grumman Aircraft Engineering Corp.
Calverton, New York

1 T 15 16 20 41

N—Parker Road and Airport north line.
E—Parker Road
S—School District No. 2
W—Airport west line

100 4475 interest under contract with U. S. of 4/1/54

The interest of the United States or of this State in the foregoing property is not assessed or taxed.

Total $17,000

"Assessment of Property Omitted from the 1954 Assessment Roll and Assessed this Year Pursuant to the Provisions of Section 24 of the Tax Law

Grumman Aircraft Engineering Corp.
Calverton, New York

1 T 15 16 20 41

N—Parker Road and Airport North line.
E—Parker Road
S—School District No. 2 122
W—Airport west line

100 4475 interest under contract with U. S. of 4/1/54

The interest of the United States or of this State in the foregoing property is not assessed or taxed.

Total ..... $11,400"

"Grumman Aircraft Engineering Corp.
Calverton, New York

2 T 15 16 23 45 123

N—School Dist. 1, Mdl Cy. Rd. & Sel. Dist. 4
E—Airpt east line and Sel. Dist. 4 and, in part by Line Rd.
S—Peconic River Airpt. so. line, Swan Pond Rd. & Wading River Rd.
W—Wading River Rd & Airpt west line

3635 4475 interest under contract with U. S. of 4 1 54

The interest of the United States or of this State in the foregoing property is not assessed or taxed.

Total $631,300

124 *Exhibit B, Annexed to Petition*

ASSESSMENT OF PROPERTY OMITTED FROM THE 1954 ASSESSMENT ROLL AND ASSESSED THIS YEAR PURSUANT TO THE PROVISIONS OF SECTION 24 OF THE TAX LAW.

GRUMMAN AIRCRAFT ENGINEERING CORP.
CALVERTON, NEW YORK

2 T 15 16 23 45

N—Sch. Dist. 1, Mdl. Cy. Rd. & Sch. Dist. 4
E—Airpt east line and Sch. Dist. 4 and, in
125 part, by Line Rd.
S—Peconic River, Airpt so. line, Swan Pond Rd. & Wading River Rd.
W—Wading River Rd. & Airpt west line.

3635 4475 interest under contract with U. S. of 4 1 54

The interest of the United States or of this State in the foregoing property is not assessed or taxed.

Total ..... $421,400"

"GRUMMAN AIRCRAFT ENGINEERING CORP.
126 CALVERTON, NEW YORK

4 T 15 16 20 50

N—Mdl. Cy. Rd. & Airpt north line
E—Airport east line
S—Peconic River
W—School District No. 2

540/4475 interest under contract of 4/1/54 with U. S.

The interest of the United States or of this State in the foregoing property is not assessed or taxed.

Total $94,800

Exhibit B, Annexed to Petition 127

ASSESSMENT OF PROPERTY OMITTED FROM THE 1954 ASSESSMENT ROLL AND ASSESSED THIS YEAR PURSUANT TO THE PROVISIONS OF SECTION 24 OF THE TAX LAW

GRUMMAN AIRCRAFT ENGINEERING CORP.
CALVERTON, NEW YORK

4 T 15 16 20 50

N—Mdl. Cy. Rd. & Airpt north line
E—Airport east line
S—Peconic River 128
W—School District No. 2

540/4475 interest under contract of 4/1/54 with U. S.

The interest of the United States or of this State in the foregoing property is not assessed or taxed.

Total ..... $63,200"

Petitioner objects to and protests the assessment of its alleged contract interest on the grounds that said assessments are illegal, presumptuous, improper, capricious and void. 129

The assessments are illegal because they are not authorized by the Tax Law of the State of New York. That part of the Tax Law, subdivision 17 of Section 4, Article I, which authorizes the taxation of a contract interest in real property, of which title is held by the United States, defines the taxable interest as,

" . . . contract of sale or other agreement whereby upon certain payment or payments the legal title is to be or may be acquired . . . "

130 *Exhibit B, Annexed to Petition*

Title to the parcels in question was taken by the United States of America in exercise of its power of eminent domain in a proceeding in the United States District Court for the Eastern District of New York entitled, "United States of America, Petitioner-Plaintiff, versus 4,475.23 acres of land etc., Defendants (Civil Action No. C. P. 84)" and said title is still held by the United States. Petitioner occupies the premises under the aforesaid contract dated April 1, 1954. This contract is a lease and is not a contract of sale.
131 The lease does not contain an agreement by the United States to sell or an agreement by the petitioner to buy the occupied property.

Petitioner is informed and believes that the Assessors have been advised that a certain provision of the lease constitutes a contract of sale. This provision is a conditional option. An option is not a contract of sale. It is merely an agreement by an owner to hold open for a determinable time an offer to sell at a determinable price. But the provision in question is not even an option, it is a statement of the conditions under which an option may come into being and may be exercised.
132 The conditions are:

(1) "In the event that the Facilities are determined to be excess to the further needs and responsibilities of the Department (of the Navy), and

(2) "the Department elects to terminate this lease . . . "

When these two conditions have been met,

"The Lessee shall have an option, which may be exercised * * * within 90 days after receipt of notice of termination, to purchase the Facilities . . . "

Then there is a further condition.

> (3) "Sale of the Facilities to the Lessee shall, however, be subject to the Department obtaining all necessary authorizations and approvals required to enable it to sell the Facilities to the Lessee."

Whoever asserts that this provision is a contract of sale should point out the payment or payments which are necessary to bring it within the provision of the Tax Law upon which they rely.

The petitioner maintains that the assessments 134
are presumptuous because they are asserted to be based upon the value of a right acquired by a contract of sale. If it is assumed that petitioner has a contract to purchase, it must necessarily be assumed that the Navy Department has entered into a contract to sell. The Board of Assessors thus assume that the Department, when it executed the lease, had the right to sell the property. Such assumption presumes to advise the Navy Department of its powers, and implies that the third condition of the potential option, namely that "all necessary authorizations and approvals required to enable it (the Department) to sell the Facilities 135
to the Lessee" be obtained, was included in the option provision for no good reason.

Said assessments are improper and capricious because, in addition to the false premise upon which they are assessed against petitioner, the values set forth are established by a theory which is a contradiction of all sound accounting principles, and which, if officially adopted by petitioner, could result in charges of fraud by its stockholders. The theory briefly is that any items for which a corporation has paid and for which it has not been repaid must, to avoid a charge of wasting corpor-

136 *Exhibit B. Annexed to Petition*

ate assets, be included on the asset side of its balance sheet. It would be bad enough to pad the Good Will item with such expenses, but the Assessors go further and assess such expenses as real property. The only pretext by which they can perform such legerdemain is by calling these items "payments" under the "contract of sale". Let us examine these "payments".

1.	Loss by petitioner on acreage sold to the U. S. Government	$ 1,052.00
137 2.	Cost of engineering survey made at petitioner's expense prior to contract with U. S. Government for establishment of Facilities	5,960.00
3.	10% of the cost of constructing improvements on Government property at Government expense on the theory that petitioner contributed services worth 10% in supervising the several contracts involved	2,350,000.00
138	Total	$2,356,112.00
	With a deduction for property in another town, and "equalizing" the assessment at 33%, the total assessed value for the Town of Riverhead is	$ 743,100.00

The assessments complained of are void because they purport to measure the value of an interest which does not exist and which under the contract of lease, relied upon by the assessors, can not exist as a matter of law.

Exhibit B. Annexed to Petition

The attempt to tax petitioner as a lessee of Government property upon a purely fictitious hypothesis constitutes an indirect effort to tax property of the United States Government, contrary to the provisions of the Tax Law of the State of New York, Article 1, Sect. 4, and of the Constitution of the United States and laws enacted thereunder, and as such is illegal and void.

Wherefore, Petitioner demands that the assessments above set forth be stricken from the roll and that said parcels be shown on said roll as exempt property.

Dated, July 12, 1955.

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

By E. CLINTON TOWL
Administrative Vice President

(Verified July 12, 1955)

142 **Notice of Motion to Dismiss Under Rule 106 R. C. P.**

SUPREME COURT

COUNTY OF SUFFOLK

[SAME TITLE]

PLEASE TAKE NOTICE that on the Petition herein a motion will be made at a Special Term of the
143 Supreme Court, to be held in and for the County of Suffolk, at the County Court House, at Riverhead, New York, *on the 29th day of September, 1955*, at the opening of the Court on that day or as soon thereafter as counsel can be heard, for an order dismissing the petition herein on the ground that the petition does not state facts sufficient to warrant the relief under the provisions of Article 13 of the Tax Law of the State of New York, and for such other and further relief as may be proper, with the costs of this motion.

Dated: Riverhead, New York,
144 September 21, 1955.

Yours, etc.,

REGINALD C. SMITH,
Attorney for Respondents,
Office and Post Office Address,
137 West Main Street,
Riverhead, New York.

To:

CHARLES KINGSLEY, ESQ.,
Attorney for Petitioner,
South Oyster Bay Road,
Bethpage, New York.

Excerpts from Argument Before Special Term, October 21, 1955

145

SUPREME COURT

SUFFOLK COUNTY

[SAME TITLE]

Riverhead, New York.
October 21, 1955.

146

BEFORE: HON. HOWARD T. HOGAN, Justice.

APPEARANCES:

CHARLES KINGSLEY, ESQ.,
Attorney for Petitioner.

REGINALD C. SMITH, ESQ.,
Attorney for Respondents.

(Page numbers shown in bold brackets are from the stenographer's transcript.)

147

[2] Mr. Smith: I represent the Town of Riverhead in a proceeding under Article 13 of the Tax Law to review an assessment. The reason why I speak first is that I have a motion to dismiss the petition on the ground that there is no triable issue of fact, and that the papers of the petitioner alone show that it is an issue of law and that there is no issue of fact, and accordingly, I move to dismiss that petition.

I admit that there is very definitely a problem for this Court to decide, but I think that it can be decided on the short record, and the motion would

148 *Excerpts from Argument Before Special Term, October 21, 1955*

ordinarily be made under rule 106. In a proceeding such as this, I believe it is Section 291 of the Tax Law requires that the school districts, though not necessarily parties to the proceeding, must receive copies of the notice of the application of the taxpayer, and in this instance there are three school districts within the area of the Grumman Aircraft Engineering Corporation plant, and School Districts No. 1 and 2, common school districts of the Town of Riverhead, are here this
149 morning with a petition, through Mr. Edmund S. Lapham, attorney, of Riverhead, [3] and School District No. 4 is here with a petition to appear amicus curiae by Mr. Horace Demarest, an attorney of Riverhead, and they at this time would like to make application to be in the proceeding.

* * *

The Court: I am going to grant the applications to permit the school boards to appear amicus curiae. All right.

* * *

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[8] Mr. Smith: Now, pursuant to the statute, the Secretary of the Navy, was given the right to grant to Grumman a first refusal of the property. In the lease he did grant to Grumman the first refusal of the property, and we say that it is in the nature of an option; though very definitely limited, and it must be definitely limited in its scope, it is still an option to buy. It is still an agreement whereby Grumman is or may be entitled to the ownership of the property.

[9] We have, in our respective briefs, agreed upon one thing today. We have agreed that the

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lease is valuable to Grumman. Heretofore there has not even been that concession. In their brief they admit that it is valuable to them. They admit that the leasing part is valuable to them, but not the option part, and I say it is one agreement and one agreement alone, and they can not separate from that lease that part which is for the rental of the property and that part of the lease which is for the option to buy. * * *

[12] Now I come to the motion to dismiss. The Tax [13] Law requires that a person taxed 152
on the assessment roll, assessed on the assessment roll, shall come on grievance day and make a complaint, and he must urge the grounds of his complaint. The reviewing provisions of the Tax Law, 290, et cetera, say that you must as- [13] sert the manner in which you are aggrieved. If it is an overassessment, you must state the amount thereof; if it is unequally applied, you must state the amount thereof.

Here Grumman came on grievance day, and they let us know in very definite terms that they thought it was illegal, that the whole thing was illegal and wrong, and that the property was im- 153
mune from taxation. But they did not say it was overassessed; they did not even attempt to say the amount of the overassessment; they did not say that it was unequally applied to them and therefore it was unequally applied in the wrong percentage.

They said, "It is illegal, it is illegal, it is illegal. Take it off, cancel it." And that is what was reviewed by the Board of Assessors, then sitting as a Board of Review, on grievance day. That alone, the question of legality, was determined by them.

and the amount of overassessment did not need to be con [14] sidered, sir, because it was not raised. If it had been raised, we could have gone into the formula of assessment.

* * *

But they didn't question the amount of overvaluation; they didn't question whether it was equally or unequally applied. And I say to you, sir, there is no issue here except the legality of
155 the total [14] assessment.

Now, there has been raised the authority to tax even the corporation for something that the government will eventually have to pay. They set forth in their brief that ninetyfive per cent of the work being done at this time is in U. S. Navy planes. That is not part of the record, but I do not have any particular objection to that. We can say, however, that [15] tomorrow it may be five per cent navy planes and ninety five per cent for American Airlines, under the statute and under the agreement.

The Court (addressing Mr. Kingsley): All
156 right.

Mr. Kingsley: I think I will take up Mr. Smith's last point first. He claims that we made no claim of overassessment or overvaluation. We never did use the word "overvaluation." We did, however, say, "The assessments complained of are void because they purport to measure the value of an interest which does not exist." Under the maxim that the greater includes the less, if there were no interest then it is overvalued. The whole thing is, of course, merely an inclination to play on the technical meaning of words, and it is not

the intent of the statute to limit a petitioner to any form of words when he has a complaint to present before the Board of Assessors. 157

Mr. Smith: May I concede, on the record at this [16] time, that I agree with him on that, that if there is no interest it is overvalued.

Mr. Kingsley: Mr. Smith has said that there is no direct precedent, possibly in the nature of an apology for the number of inapplicable cases that he has cited. The fact is that Section 17, sub-division 17 of the Tax Law, has been in its present place since 1933, and forms of lease such as the present one in substance have been used by the government since 1940, to my knowledge, when I first got into the government type of contract, and there are no cases whatever that cite that any such option or any such lease is within the definition of sub-division 17. 158

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[17] Now, this particular agreement that we have is a lease. It does have a conditional option agreement [18] in it. As a lease, it is personal property. As an option, it is personal property, and if we were in a state which permitted taxation of personal property, this could undoubtedly be valued and taxed. But we are not in such a state, and we are not going to submit to this fiction of calling personal property an interest in real property, a taxable interest in real property. The equitable and the legal title to this particular property is in the United States government, and in nobody else. 159

Now, when we talk about value, we admit that this leasehold has value. It doesn't mean that it

has to be taxable value. It doesn't mean that it can be expressed in dollars and cents. A man's reputation is valuable, but you do not value it in money until he loses it through a libel, or something of that sort.

It is not transferable. Our lease is not transferable; our possession option is not transferable. The option is so hedged around with restrictions that it is a very questionable asset, if it is an asset at all.

161 [19] * * * There is quite a body of law and a number of government regulations, which I do not have here but which could be produced if we go on to press our original petition for review, to show that the government can not sell any property until it is declared surplus to the government's needs or excess to the government's needs.

Now, the procedures generally, which I have outlined in my brief, are that when a department that has jurisdiction of the property finds out that it is excess to its needs, it is then circulated amongst other departments of the government to
162 see whether they have any use for it, and if none of them has any use for it, it then goes to the General Services Administration, which may dispose of it and usually disposes of it by referring it back to the department which had original jurisdiction and allows them to dispose of it.

That is what is meant in our potential option, that if we agree to purchase this property in the event that they terminate our lease, then the Navy Department will transfer the title provided it can get the necessary consents, which is a pretty involved proposition.

[20] Now, in this particular, basic all these initial recitations show compliance with the statute. The government owns the property; the Secretary of the Navy has determined that the plant and supporting facilities are not excess to the needs of the department but are not for the time being required for public use. Now, that sets up the condition precedent for a lease. They can't sell it because it isn't excess to the needs of the department. They can't even assign it to another department, because it isn't excess to 164
the needs of the department. But being not for the time being required for public use does permit them to lease it.

Then they go through the other recitations which are necessary, that we are a contractor and that it is made under the authority of the law and has been approved by the Armed Services Committee of Congress, and all those conditions were met with before they entered into this agreement.

Now, the condition to expend a million dollars on the property does not set up any right of the county to tax it even if we had spent the 165
million dollars. We would not own those improvements. They would be [21] improvements to the leasehold and would be written off under our contracts as part of leasehold improvement, which would be charged to the cost of production both in the Navy accounting procedures and the United States Treasury Department procedures for tax purposes. So that the company, by putting this improvement in, would be enriching the government but not at its own expense, because it would indirectly be reimbursed, because it is

including over the period of years the cost of the improvements in the cost of its product.

I have cited the case of County of Allegheny, which is the Mesta Machine case, in which the Supreme Court definitely decided against the attempt of the County of Allegheny to assess taxes against a government contractor, on the theory that such taxes were actually assessed against the government because the government had to pay them, and that would be the case if these taxes
167 were sustained here, and if the government consented to their being sustained here, because it is up to the government to allow us to charge them off as a cost of production. If the government does not do so, then the Grumman Company would have to pay it out of its profits after taxes, if we had any [22] profits.

The Court: Pardon me, counsellor. In other words, then, there is no provision in this leasehold agreement with the United States government relative to taxes? In other words, there is no such contingency provided for?

168 Mr. Kingsley: Oh, I don't want you to get that idea, your Honor. There is a contingency that if the Congress of the United States should enact a law permitting the taxing of real property owned by the government and occupied by a contractor, then that contractor shall pay such taxes and the rental will be renegotiated.

The Court: But it is only under those circumstances?

Mr. Kingsley: There is another provision in the law, which my colleague seems to read in his favor, and that is that there is an exception—the

taxes may be paid if the possessory interest is taxable. Well, the possessory interest as a leasehold is not taxable in this state. There are other states where the government recognizes such taxes, but not in New York. There is no personal property tax in New York.

[23] It is our position that we have cooperated fully with the tax assessors in giving them all the information that was necessary. They were determined to find something taxable and adopted a most unusual, to quote my friend's language, 170
method of assessment.

We have been supplied with the minutes of the meeting at which they were advised that the Town could make the assessment, and they have adopted a method which I have outlined in my brief, which is utterly fantastic and unrealistic.

The Court: All right.

Mr. Smith: Your Honor raised the point about the right to charge back taxes levied, and I would like to read that to you as another indication of the consent of the federal government that their possessory interest in this contract is taxable. 171
This is Article 9 of their agreement, which was made pursuant to that statute that I quoted: "In the event that as a result of any future act of Congress subjecting government-owned property to taxation, taxes, assessments or similar charges are imposed by state or local authorities upon the property leased herein (other than upon lessee's possessory interest therein) . . . "

[24] Now, it is the lessee's possessory interest therein that we have assessed and we propose to tax. We do not wish to have the Court under-

172 *Excerpts from Argument Before Special Term, October 21, 1955*

stand that we are attempting to tax anything that belongs to the United States of America.

• • •

[26] Mr. Kingsley: "Possessory interest" is used very broadly by my opponent. Possessory interest under a lease is not taxable. It is the equitable title, the equitable possessory interest, which is taxable, and we don't have that in this case.

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The Court: All right, gentlemen, I will take your papers and your memoranda.

[27] Now, counsel for the school districts, if you gentlemen wish to submit memoranda, I would appreciate it if you, too, would have everything in here by Friday.

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Final Order Appealed From

At a Special Term of the Supreme Court of the State of New York held in the County of Suffolk, at the County Court House, Riverhead, New York, on the 4th day of January, 1956.

PRESENT: HON. HOWARD T. HOGAN, Justice.

[SAME TITLE]

176

The petitioner having instituted a proceeding under Article 13 of the Tax Law of the State of New York to review the assessments against it appearing on the 1955-56 assessment roll of the Town of Riverhead, New York, and praying that the same be declared illegal, erroneous and void and that the same be stricken from the said assessment roll, and on the return of said petition on the 21st day of October, 1955 the respondent by its attorney, Reginald C. Smith, having moved for an order under Rule 106 of the Rules of Civil Practice to dismiss said petition on the ground 177
that it did not state facts sufficient to warrant the relief prayed for; and the said motion having regularly come on to be heard before this Court on the 21st day of October, 1955, now on reading and filing the notice of motion dated the 21st day of September, 1955, the petition and notice pursuant to Article 13 of the Tax Law, dated the 9th day of September, 1955, and after hearing Reginald C. Smith, Esq., attorney for respondents in support of said motion, and Charles Kingsley, Esq. in opposition thereto, and due deliberation

178 *Final Order Appealed From*

having been had thereon, and upon filing the opinion of the Court dated the 7th day of December, 1955,

Now, on motion of CHARLES KINGSLEY, attorney for petitioner, it is

ORDERED, that the respondents' motion to dismiss the petition under Rule 106 of the Rules of Civil Practice is in all respects denied, and it is further

179 ORDERED, that the petition is sustained and the assessments against petitioner being illegal, erroneous and void, it is further

ORDERED, that the respondents, The Board of Assessors of the Town of Riverhead, New York, and all tax officials having jurisdiction thereof, strike from the assessment roll for the year 1955-56 the assessments against Grumman Aircraft Engineering Corporation appearing thereon.

Enter,

H. T. H.
J. S. C.

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Decision—Opinion of Hogan, J.

181

Dated December 7, 1955

SUPREME COURT

SUFFOLK COUNTY

[SAME TITLE]

Petitioner has instituted a proceeding under Article 13 of the Tax Law to review and strike from the rolls, the assessments made against it on 182
the 1955-56 assessment roll of the Town of Riverhead, covering its alleged interest in certain real property lying in said Town, owned by the United States but occupied by petitioner under a lease. Upon the return of said petition, the respondent moved that it be dismissed upon the ground that it failed to state facts sufficient to warrant such relief.

It is the petitioner's contention that it has absolutely no assessable or taxable interest whatsoever in the property involved. The Court is called upon to determine whether the "Supplemental Facilities Agreement" between the petitioner and the United States of America brings 183
it within the operation of Section 4, Subdivision 17 of the Tax Law of the State of New York, which statute directs the taxation of the interest of a corporation in real property held under an agreement, "- - - whereby upon certain payment or payments, the legal title is to be or may be acquired by such corporation - - -".

The Supplemental Facilities Agreement was entered into on August 26, 1954, under the authority of Title 34, Section 522 (a) of the United

States Code. In form it is a lease of certain land and improvements owned by the Government, lying in the Towns of Riverhead and Brookhaven, and constituting the Naval Industrial Reserve Aircraft Plant, D. O. D., No. 466.

Article X thereof is entitled "Improvements, Mobilization and Option to Purchase" and reads as follows:

"ARTICLE X—IMPROVEMENTS, MOBILIZATION AND OPTION TO PURCHASE.

185 "(a) In the event that the Facilities are determined to be excess to the further needs and responsibilities of the Department, and the Department elects to terminate this lease in accordance with the provisions of paragraph (d) of Article VII hereof, the Lessee shall have an option, which may be exercised by notice of intention to purchase delivered to the Department at any time during a period of ninety (90) days after receipt of notice of termination, to purchase the Facilities at thier original cost to the Government less depreciation on improvements (exclusive
186 of improvements financed by Lessee) at the rate of 3% per annum from the date of completion of the Facilities to the date notice of Lessee's intention to exercise such option is received by the Government. Sale of the facilities to the Lessee shall, however, be subject to the Department obtaining all necessary authorizations and approvals required to enable it to sell the Facilities to the Lessee.

"(b) In the event Lessee purchases the Facilities in accordance with paragraph (a) hereof, the Lessee hereby covenants and

agrees that, for a period of twenty (20) years from the date of the deed which effects a transfer of said Facilities to the Lessee, it will maintain said Facilities in such condition that they will at all times be capable of producing military aircraft for the department within thirty (30) days after receipt by Lessee of a mobilization notice from the Department; and Lessee further agrees that such covenant may, at the option of the Department, be made a part of the deed of conveyance from the Government. 188

"(c) The Lessee hereby covenants and agrees that, subject to and in accordance with the provisions of Article XI hereof, it will, within five (5) years from the date hereof, expend not less than $1,000,000 for the construction of additional buildings, structures or other improvements to the Facilities. In the event that this lease is terminated by either party prior to the expiration of the first five year term hereof, then the provisions of this paragraph (c) shall be of no force and effect; *provided, however*, that if 189 this lease is terminated during the first term hereof and the Facilities are sold to the Lessee in accordance with the provisions of paragraph (a) of this Article and Lessee at the date of the sale has not expended $1,000,000 for the construction of additional buildings, structures or other improvements to the Facilities, then the deed of conveyance to Grumman Aircraft Engineering Corporation shall contain a covenant on the part of Grumman Aircraft Engineering Corporation to carry out the provisions of this paragraph (c).

It should be noted that the lessee is not granted an absolute option, but merely a right of first refusal when *and if* the Government elects to terminate the lease, and when and if the Navy Department obtains all necessary authorizations and approvals. These "necessary authorizations and approvals" have been described to the Court by petitioner's counsel as follows:

> "- - - when a department that has jurisdiction of the property finds out that it is
191 excess to its needs, it is then circulated amongst other departments of the government to see whether they have any use for it, and if none of them has any use for it, it then goes to the General Services Administration, which may dispose of it and usually disposes of it by referring it back to the department which had original jurisdiction and allows them to dispose of it."

What the petitioner has, therefore, is simply a lease with a right of first refusal in the event that the landlord elects to, and can sell the leased
192 premises.

The Congress of the United States has permitted State and local governments to tax such leases by enacting, in 1947, Section 522e, Title 34, of the United States Code, which provides that:

> § 522 (e) LEASE OF REAL OR PERSONAL PROPERTY: STATE OR LOCAL TAXATION; RENEGOTIATION OF LEASES.
>
> "The lessee's interest, made or created pursuant to the provisions of sections 522a—522e and 522e of this title, shall be made sub

ject to State or local taxation. Any lease of property authorized under the provisions of said sections shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated."

In those states which permit the taxation of personal property, such a lease, as well as the conditional option, could be assessed and taxed without further ado. In New York, on the other 194
hand, it is provided that "- - - personal property, whether tangible or intangible, shall not be liable to taxation locally for State or local purposes." (Tax Law, Sec. 3)

It is fundamental, however, that the Legislature may classify property for tax purposes in any manner it deems proper (People ex rel. Holmes Electric Protective Service Co. v. Chambers, 125 N. Y. S. (2d) 436). Has it classified the interest of this petitioner arising under the Supplemental Facilities Agreement in such manner as to make it taxable? Such classification, if in fact it has been made, must be found in the aforesaid Section 4, 195
subd. 17 of the Tax Law. This subdivision was enacted in 1925, twenty-two years *prior* to the partial relinquishment by the United States of its sovereign right to exemption from State and Local taxation (U. S. C. Title 34, Sec. 522 (c), supra). Its pertinent provisions read as follows:

"Whenever the legal title of real property is in the United States - - -, but the use, occupation or possession thereof is in a corporation - - - or its - - - successor in interest, under a contract of sale or other agreement

whereby upon certain payment or payments, the legal title is to be or may be acquired by such corporation - - -, its interest in such real property shall be assessed and taxed as real property subject to the provisions of this subdivision - - . The interest in any such property of the corporation - - - which - - - is in the use, occupation or possession thereof, shall be assessed and taxed in the same manner as if said corporation - - - held the legal title to such property, except for
197 the addition to the description of the words, descriptive of the interest in the property so assessed. *Such assessment shall be at the full value of such property without deduction therefrom on account of the whole or any part of the purchase price, or other sum due on such property, remaining unpaid - - -*".

Was the Statute designed to make taxable an interest such as this petitioner's or was it intended only to reach a *vendee in possession* under an executory agreement of sale, one who was the equitable owner of the premises but who would
198 not receive legal title until a final payment had been made?

It is to be interpreted in the light of the principle that "A statute which levies a tax is to be construed most strongly against the government and in favor of the citizen. The government takes nothing except what is given by the clear import of the words used, and a well-founded doubt as to the meaning of the act defeats the tax." (Good Humor Corp. v. McGoldrick, 289 N. Y. 452, 455; See also RKO-Keith-Orpheum Theatres, Inc. v. City of New York, 285 App. Div. 374), and Chief Justice Conway of the Court of Appeals said, in

the case of American Locker Co. v. City of New York, 308 N. Y. 264:

> "Moreover, it was well said in Gould v. Gould (245 U. S. 151, 153): 'In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen. United States v. 200
> Wigglesworth, 2 Story, 369; American Net & Twine Co. v. Worthington, 141 U. S. 468, 474; Benziger v. United States, 192 U. S. 38, 55'. (See, also, Matter of Holmes Elec. Protective Co. v. McGoldrick, 262 App. Div. 514, affd. 288 N. Y. 635; Matter of Brooklyn Union Gas Co. v. McGoldrick, 270 App. Div. 186, 195, affd. 298 N. Y. 536; Matter of Good Humor Corp. v. McGoldrick, 289 N. Y. 452)".

The mandate of the Statute is that the assessment shall be at the *full value of the property*, 201
without deduction for the unpaid portion of the purchase price. Such language hardly indicates an intent to confer upon a local taxing authority the power to impose upon a lessee under a five year tenure, terminable at the will of the landlord, a tax *based upon the full value of the leased property*, merely because the lease contains a right of first refusal when and if the landlord decides to sell. The Act does not provide for an assessment at the value of the lessee's interest in the property, but for an assessment "at the full value" of *the property itself*.

Even if there were a reasonable doubt as to the effect of this language, it would have to be construed in favor of the taxpayer (Dun & Bradstreet v. City of New York, 276 N. Y. 198, 204).

The respondent has offered several decisions which, it claims, support its position. In S. R. A., Inc. v. Minnesota, 327 U. S. 558, the corporation was occupying the premises sought to be taxed under an *executory contract of sale*, under which it had obtained an equitable interest which would indefeasibly ripen into legal title when and
203 if it completed the payments on account of the purchase price. Instead of passing title subject to a purchase money mortgage, the vendor (the United States) permitted the vendee to occupy the premises, but retained title until payments were completed. It was held that the State of Minnesota could tax the vendee's equitable interest, so long as the right of the United States to repossess upon default remained paramount. The case at bar is clearly distinguishable by reason of the fact that this petitioner has no equitable ownership, nor even an absolute right to acquire ownership—under an agreement of sale, but merely a
204 right of first refusal *if* the owner should decide to sell.

In U. S. v. Woodworth, 66 Federal Supp. 641, it was held that Government owned property (in the State of New York) to the full extent of the Government's interest therein, is immune from taxation, either as against the Government itself or as against one who holds as a bailee. The Court added the following statement by way of dictum:

> "The City and County did not undertake to levy taxes upon the interests of Eastman Kodak Company and Bausch & Lomb Optical Company (leases with conditional options to

205

purchase from the United States) as they might possibly have done under Section 4, subdivision 17 of the tax law, if the interests of said corporations, as defendants contend, amounted to an interest 'under a contract of sale or other agreement whereby upon certain payment or payments, the legal title is to be or may be acquired by such corporation ---'."

This is far from holding that such interests were, in fact, taxable.

206

In Dayton Development Fort Hamilton Corp. v. Boyland, 133 N. Y. S. (2d) 831, decided by Mr. Justice Ughetta, the United States leased real property in the City of New York to petitioners for a term of 75 years for the purpose of erecting housing units thereon. The lease further provided that title to all improvements constructed upon the premises by the lessees should remain in them, and that they might elect to remove such improvements upon the termination of the lease. These two circumstances, i.e., the 75 year term and the retention of title to improvements apparently formed the basis for the imposition of a real 207 estate tax. The petitioner in the case at bar has no title of any nature to the improvements.

In People ex rel. Mergenthaler v. Mills, not reported, but affirmed 281 App. Div. 167, Mr. Justice Ughetta held that where the petitioner leased real property from the Defense Plant Corporation, one of the terms of the lease being that the lessee agreed to pay all taxes on it or upon the Defense Plant Corporation, and another being that the lessee could include the amount so paid in the price it charged the United States for its height finders, and where, concededly, the Defense Plant

Corporation was not vested with tax exemption, the fact that the United States, through delay or administrative oversight, failed to convey legal title to the Defense Plant Corporation for the first years of the lease, was no ground for exempting the petitioner from local taxation. To base exemption on such a mere technicality, he said, would be to exault form over substance.

Alabama v. King & Boozer, 314 U. S. 1, is authority only for the principle that when one contracts to sell or to manufacture for the United
209 States Government on a "cost-plus" basis, the fact that any tax imposed upon the contractor will be paid indirectly by the United States, is no ground for exempting the contractor from taxation.

The Legislature may, if it sees fit, make this type of leasehold subject to local taxation at its fair value. The impact of a large operation such as this petitioner's, accompanied by an influx of hundreds of workers and their families, can result in great and sudden hardship to an established community or school district. But until the Legislature does so in plain and unequivocal language,
210 the Court is constrained to apply the aforesaid statutory rules of construction to existing legislation, and to find that the tax sought to be imposed is unauthorized. Respondent's motion to dismiss the petition under Article 13 of the Tax Law accordingly, is denied. The petition is sustained and respondent will be directed to remove from its tax rolls, the assessments set forth therein.

HOWARD T. HOGAN
J. S. C.

211

Stipulation Waiving Certification

It Is Hereby Stipulated by and between the attorneys for the respective parties hereto that the foregoing are true copies of the judgment roll, the notice of appeal, the excerpts from the argument at Special Term, taken down, and the whole thereof, now on file in the office of the Clerk of the County of Suffolk, and that certification thereof is hereby waived and that an order directing the filing of the record in the Appellate Court may be entered without further notice.

212

Dated: January 10, 1956.

Reginald C. Smith
Attorney for Respondents-Appellants

Charles Kingsley
Attorney for Petitioner-Respondent

Edwin S. Lapham
Attorney for Common School Districts Numbers 1 and 2, Town of Riverhead.

Horace A. Demarest, Jr.
Attorney for Common School District No. 4, Town of Riverhead.

213

214

Order Filing Record in the Appellate Division

Pursuant to the foregoing stipulation, it is

ORDERED, that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court, Second Judicial Department.

Dated: Mineola, New York,
January 11, 1956.

HOWARD T. HOGAN
J. S. C.

215

216